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No. 02-1066

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KUEHNE & NAGEL, INC.,

Petitioner,

—v.—

MOTOROLA, INC. and FIREMAN'S FUND INSURANCE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Petitioner KUEHNE & NAGEL, INC. ("KNI") respectfully submits this reply to Respondents' Brief in Opposition ("Opp. Brief") to the Petition for writ of certiorari.

ARGUMENT

I

THE UNDISPUTED CONFLICT AMONG THE CIRCUITS WITH RESPECT TO THE AWARD OF PREJUDGMENT INTEREST BEYOND THE TREATY'S LIABILITY LIMIT REQUIRES THE COURT'S INTERVENTION

Respondents concede, as they must, that there is a conflict among the Circuit Courts as to whether prejudgment interest may be awarded in addition to the Article 22 limit of liability of the unamended Warsaw Convention.[1] *See* Opp. Brief at 2; *see also* Petition at 8-15 citing cases. In fact, even the Court of Appeals below recognized the conflict. *See* Appendix to Petition for Writ of Certiorari ("Petition App.") at 15a-18a. Nevertheless, respondents claim that the issue of prejudgment interest is not sufficiently important to warrant review by this Court because (1) "any award of prejudgment interest would still be quite small," and (2) "very few Warsaw cases complete the trial phase." *See* Opp. Brief at 3. Respondents' unsupported arguments are incorrect and, even if accepted as true, they cannot justify the con-

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in note following* 49 U.S.C.A. § 40105 (1997) (note). It is undisputed that this action is governed by the unamended Warsaw Convention.

tinued misinterpretation and misapplication of a treaty of the United States.

The issue of prejudgment interest arises in every Warsaw Convention case, regardless of its value or whether the case settles,[2] proceeds to trial or is appealed. To allow the acknowledged conflict to continue on such a basic issue involving one of the most widely and often applied treaties in the world is intolerable. Indeed, allowing this conflict to continue will lead to forum shopping, which consistently has been discouraged since the Court's decision in *Erie R. Co. v. Tompkins*, 304 U.S. 54 (1938). *See Hanna v. Plummer*, 360 U.S. 460, 468 (1965).

The language of Article 22(2) of the Warsaw Convention is clear and unambiguous: "In the transportation of checked baggage and goods, the liability of the carrier shall be limited to the sum of 250 francs per kilogram. . . ." The decision of the Court of Appeals below, as well as the decisions of the Fifth Circuit,[3] in effect improperly amend Article 22(2) to read: "In the transportation of checked baggage and goods, the liability of the carrier shall be limited to the sum of 250 francs per kilogram **in addition to the prejudgment interest thereon**. . . ." "Postratification adjustments, however, are appropriately made by the treaty signatories." *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 171, n.12 (1999).[4] As the Court consistently has cautioned: "where

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[2] Common sense dictates that the specter of a recovery of prejudgment interest (or not) affects the settlement value of a case.

[3] *See Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256, 262-64 (5th Cir. 1984); *Boehringer-Manheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456, 460 (5th Cir. 1984).

[4] Even the provisions of the 1955 Hague Protocol relied upon by the Court below (Petition App. at 23a-24a) do not expressly allow prejudgment interest. *See* Protocol to Amend the Convention for the

the text is clear, as it is here, [a court] has no power to insert an amendment." *Chan*, 490 U.S. at 134.

The conflict is undisputed and intolerable. The Court should reject respondents' proffered rationale for ignoring the conflict and grant the Petition for Writ of Certiorari to bring the lower courts back in line with the express text of Article 22(2) of the Warsaw Convention.

II

THE COURT SHOULD CORRECT THE IMPROPER APPLICATION OF THE "AFFECTED VALUE" DOCTRINE

The issue before the Court is whether the "affected value" doctrine was applied properly in this case, based on the facts as determined by the district court and as governed by the unamended Warsaw Convention. Although there is no conflict among the Circuit Courts on this issue (in fact, there are no controlling Circuit Court decisions), the issue is of extreme importance, as the lower courts have misinterpreted one of the central provisions of the Warsaw Convention—Article 22. If allowed to stand, this misinterpretation will be perpetuated by other courts in cases involving both the unamended Warsaw Convention and the Convention as amended by Montreal Protocol No. 4.[5] Accordingly, this

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Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, Sept. 28, 1955, 478 U.N.T.S. 371. In any event, while the drafting history and post-ratification conduct of the parties may be relevant if the text is ambiguous or to confirm its meaning, they cannot serve as a basis to amend the express text. *See Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 225 (1996); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989).

[5] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, as amended by

issue of treaty interpretation is important, has wide-ranging effect and is recurring. *See, e.g., Trans World Airlines, Inc. v. Franklin Mint, Corp.*, 466 U.S. 243 (1983) (addressing proper interpretation of Article 22).

The "affected value" doctrine is not part and parcel of Article 22 "in all Warsaw cases" as argued by respondents. *See* Opp. Brief at 6-7. Moreover, petitioner did not "agree[ ] to the method of calculating damages at trial." Opp. Brief at 5-6. Rather, for purposes of trial, petitioner agreed only that the method of calculation had been resolved by summary judgment as follows:

> [if] the damage to the shipment rendered the entire system inoperable and caused the construction or operation of the shipped system to be delayed for a period of several weeks, then the proper weight to be considered under Article 22(2) of the Warsaw Convention is the total weight of the shipment.

See Summary Judgment Order (Reply App. at 10a).[6] This portion of the district court's summary judgment order was then incorporated into the Joint Final Pretrial Order under the heading entitled "Legal Issues Resolved By Summary Adjudication Order." *See* Joint Final Pretrial Order (Reply App. at 24a).

A. The 1955 Hague Protocol's "Affected Value" Doctrine Cannot Properly Be Read Into the Unamended Warsaw Convention

The first and foremost goal of the Warsaw Convention was to limit the liability of the air carrier for lost cargo. *Franklin Mint. Corp.*, 466 U.S. at 256. "The Conven-

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the Protocol Done at The Hague, 1955 and by Protocol No. 4 of Montreal, 1975, *reprinted in* S. Exec. Rep., No. 105-20 (1998).

[6] All references preceded by "Reply App." refer to pages in the Appendix hereto.

tion's second objective was to set a stable, predictable, and internationally uniform limit that would encourage the growth of a fledgling industry." *Id.* Thus, the "affected value" doctrine, absent from the express language of Article 22(2) of the Warsaw Convention, should be rejected as contrary to both of these goals.

Article 22(2) of the unamended Warsaw Convention does not contain any language upon which the "affected value" doctrine can be based. The text is clear and direct:

> In the transportation of checked baggage and of goods, **the liability of the carrier shall be limited to a sum of 250 francs per kilogram**, unless the consignor has made, at the time when the **package** was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than, the actual value to the consignor at delivery.

Warsaw Convention, Article 22(2) (emphasis added).

The language used in Article 22(2) evinces that the liability limit is calculated based upon the weight of the damaged "package" and not on the weight of the entire "shipment" or other "packages." Moreover, application of the "affected value" doctrine necessarily leads to unpredictability and increased liability for items not actually damaged.

Nevertheless, the Court below found that "the text and drafting history of the Warsaw Convention are silent on this question" and turned to the text of the 1955 Hague Protocol as putative support for the application of the "affected value" doctrine to this unamended Warsaw

Convention case. *See* Petition App. at 8a-10a. Article XI of the 1955 Hague Protocol amends Article 22(2) of the Warsaw Convention as follows:

> In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of any object contained therein, **affects the value of other packages** covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

1955 Hague Protocol, Article XI (emphasis added).

The characterization by the Court below of the 1955 Hague Protocol amendment as a mere *clarification* (Petition App. at 9a) is based upon an improper reading of the 1955 Hague Protocol drafting history. *See, e.g.*, I *International Conference on Private Air law, The Hague, September 1955–Minutes*, at 251-253, ICAO Doc. 7686-LC/140 (Sept. 1956); ICAO Legal Committee, *Minutes of the Ninth Session, Rio de Janeiro, 25 August–12 September 1953*, ICAO Doc. 7450-LC/136-1 at 153-55 (1954) (comments of Mr. Drion (Netherlands) and Mr. Ambrosi (Italy)). Neither does the decision of the Court of Appeals in *Deere & Co. v. Deutsche Lufthansa Aktiengesellschaft*, 855 F.2d 385 (7th Cir. 1988), support the decision of the courts below. Although the Seventh Circuit in *Deere* acknowledged the importance of the issue, as the parties agreed to its application, the Court declined to address the applicability of the "affected

value" doctrine to unamended Warsaw Convention transportation. *Id.* at 391, n. 13.

As with the prejudgment interest ruling, the Court below improperly read language into Article 22(2) of the Warsaw Convention to allow for recovery of damages not allowed by the plain text of the Convention. *See Tseng*, 525 U.S. at 171, n.12; *Chan*, 490 U.S. at 134.

B. Even the "Affected Value" Doctrine Requires Evidence that the Value of the Undamaged Cargo Was "Affected"

Assuming that the "affected value" doctrine was applicable to the unamended Warsaw Convention, the Court below misapplied the doctrine in this case. The proper evidentiary standard of the "affected value" doctrine is legal, not factual as argued by respondents. *See* Opp. Brief at 5-6.

The express language of the 1955 Hague Protocol requires that a cargo's loss, damage or delay "affect[ ] the value of other packages" to increase the carrier's limit of liability to more than just the weight of the packages actually damaged, which inherently requires evidence of the diminution in the "value" of the other undamaged packages. Here, the courts below did not look at whether the damage to the control frame actually "affected the value of other packages" of the cellular base station. Rather, the district court focused only on whether the construction and operation of the base station was delayed, and this error was compounded by respondents' failure to submit evidence that this delay actually had any effect on the "value" of the undamaged components. *See* Petition App. at 12a-15a; Reply App. at 10a.

As justification for the "affected value" doctrine, both of the courts below relied on the decisions of the courts

in *Deere & Co. v. Deutsche Lufthansa Aktiengesellschaft*, 621 F. Supp. 712 (N.D. Ill. 1985), *aff'd*, 855 F.2d 385 (7th Cir. 1988). In *Deere*, plaintiff sued for damage to a "director frame," one of a number of components comprising part of an IBM Model 3032 computer. 621 F. Supp. at 721-22. Although the damage was to only one component of the computer, it rendered the computer inoperable and could not be replaced for a period of several months. *Id.* at 722. Based on this, the *Deere* district court calculated the Warsaw Convention limit of liability based on the weight of the entire shipment, instead of just the damaged component. *Id.* Significantly, in *Deere*, plaintiff claimed $195,500 in damages, consisting of the cost of repair and associated transportation costs, and the cost of leasing a replacement computer for the several months in which the computer was inoperable. *Id.* On appeal, the Seventh Circuit upheld the district court's decision but did not actually review whether the "affected value" doctrine was applicable as a matter of treaty law. *Deere*, 855 F.2d at 391.

Here, respondents' damages related solely to the 680 kilogram portion of the shipment actually damaged, but they seek to calculate the liability limit based upon the weight of the entire shipment (*i.e.*, 12,204 kilograms). The "affected value" doctrine, however, required respondents to present some evidence of how the damaged component affected the "value" of the other components (*i.e.*, diminution of value). None was presented and a delay in obtaining a replacement part, standing alone, is insufficient to establish that the damage to one package affected the value of the other packages. Even in *Deere*, there was evidence that the damaged shipment and delay, in fact, affected the value of the undamaged components.

The Court below misapplied the "affected value" doctrine to Article 22 of the unamended Warsaw Convention

to increase the limit of liability based upon the weight of the entire shipment rather than the packages actually damaged (and further disregarded the true Article 22 treaty limit of liability by the imposition of prejudgment interest on this inflated value), contrary to clear treaty law and the goals of the Convention's drafters.

CONCLUSION

The Petition for Writ of Certiorari should be granted in all respects.

Dated: April 29, 2003

Respectfully submitted,

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REPLY APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 99-03659 WHA
Filed September 25, 2000

MOTOROLA, INC., a corporation, and FIREMAN'S FUND INSURANCE COMPANY, a corporation,

Plaintiffs,

—v.—

FEDERAL EXPRESS, a corporation; KUEHNE & NAGEL, INC., a corporation, and DOES ONE through TEN, inclusive,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART SUMMARY JUDGMENT TO MOTOROLA, DENYING SUMMARY JUDGMENT TO FEDERAL EXPRESS AND GRANTING SUMMARY JUDGMENT TO KUEHNE & NAGEL

INTRODUCTION

In this action for breach of contract and negligence, the general issue concerns allocation of the risk of loss for damage done to Motorola's shipment from Dallas to Tokyo. The parties filed cross motions for summary judgment. In each motion herein decided, the summary judgment record was viewed in the light most favorable to the nonmoving party.

The Warsaw Convention applies to this shipment. The convention's provisions on limits on liability apply. The limit of liability, the Court holds, is assessed based upon the weight of the overall cargo if it is shown at trial that the overall Cellular Base Station system was affected by the damage to part of the shipment. This and other issues will be addressed below.

STATEMENT

Motorola hired Kuehne & Nagel to transport a Cellular Base Station system. On July 10, 1997, Relocation Services Inc. (RSI), a company hired by Motorola, packaged the cargo into a number crates. Kuehne & Nagel then arranged for Federal Express to ship the cargo. Between July 10 and July 15, Federal Express used several planes to transport this equipment. Both Kuehne & Nagel and Federal Express issued "clean" air waybills. A clean air waybill means that there was no apparent damage to the cargo before transport. Kuehne & Nagel and Motorola claim that Kuehne & Nagel noted damage to a portion of the cargo when the shipments arrived in the airport in Tokyo. Upon receiving them, Motorola claims that part of the Cellular Base Station system had sustained severe damage. Motorola replaced the equipment allegedly damaged, and was reimbursed for this

expense, less its $25,000.00 deductible, by its insurance company, Fireman's Fund. On June 21, 1999, Motorola and Fireman's Fund filed this action against Kuehne & Nagel and Federal Express based upon breach of contract and negligence. This order responds to various cross-motions for summary judgment.

ANALYSIS

The Summary Judgment Standard

In order to withstand a motion for summary judgment, the opposing party must set forth specific facts showing that there is a genuine issue of material fact in dispute. Fed. R. Civ. P. 56(e). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In the absence of such facts, "the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

"[A] party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda." *SA Empresa de Viacao Aerea Rio Grandense (Varig Airlines) v. Walter Kidds & Co.*, 690 F.2d 1235, 1238 (9th Cir. 1982). Rule 56 provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts [that would be admissible as evidence] showing that there is a genuine issue for trial . . . ."

The Court does not make credibility determinations with respect to the evidence offered and is required to draw all inferences in a light most favorable to the non-moving party. *T.W. Elec. Serv., Inc.* v *Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987) (*citing Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Summary judgment is not appropriate "where contradictory inferences may reasonably be drawn from undisputed evidentiary facts . . . ." *Hollingsworth Solderless Terminal Co.* v *Turley*, 622 F.2d 1324 (9th Cir. 1989).

The Warsaw Convention

The Warsaw Convention governs situations that arise from the "international transportation of persons, baggage or goods performed by an aircraft for hire." Warsaw Convention (for the Unification of Certain Rules Relating to International Transportation by Air) October 12, 1929, at 1(1), 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11, reprinted in 49 U.S.C. 40105 note (1995). The convention applies where, as here, the place of departure and the place of destination are located within the territories of two High Contracting Parties. Warsaw Convention Art.1(2). The movement of the Cellular Base Station system is considered the "transport of goods" as defined by the convention. Warsaw Convention Art. 1(2). Both Federal Express and Kuehne & Nagel are subject to carrier liability under the convention.[1]

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[1] As an "indirect air carrier" (a freight forwarder who issues air waybills), Kuehne & Nagel is bound by the provisions of the convention. *See Hitachi Data Systems Corp. v. Nippon Cargo Airlines*, 1995 WL 16923, at *5 (N.D.Cal. Jan. 6, 1995).

The Limit on Liability Is Based Upon the Total Affected Weight of The Shipment

Article 22(2) of the convention provides a limit on a carrier's liability. Article 22(2) provides:

> In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires.

Liability is established on the basis of the weight of the cargo to $20 per kilogram (or $9.07 per pound). The convention, however, is silent as to the weight that should be considered in a case such as this, in which damage done to a single package arguably affects the value of the entire shipment.

If the Court were writing on a clean slate, some strong practical arguments could be made for limiting the carriers' liability to only those packages damaged. First, it is left up to the shipper how to subdivide the shipment and the shipper is in a position to subdivide (or not) so as to fashion the limits preferred. (RSI, acting as Motorola's agent, packaged the shipment at issue.) Second, the convention explicitly permits a "declared higher value," so that shippers would be in a position to protect themselves. Third, this provision of the Warsaw Convention is vague and/or silent as to its intent on this issue. There is no persuasive legislative history or convention deliberations that illuminate the question. The supplements filed after oral argument do not supply any convincing evidence of intent at the time the Warsaw Convention was adopted. In such circumstances, much can be said for letting the parties resolve such silence by

contract. Article 33 permits such contracting so long as it does not conflict with the convention. If the contract could be used for this purpose, then this issue would probably be controlled by *Read Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190 (9th Cir. 1999). There, the Ninth Circuit construed language similar to the waybill at issue to limit liability to the package damaged—and not the entire shipment. That decision was based on federal common law and not on the Warsaw Convention.

But there is not a clean slate. The issue of the proper weight to consider when applying the limitation-on-liability provision was first addressed in *Deere & Co. v. Deutsche Lufthansa Aktiengesellschaft*, 621 F. Supp. 721 (N.D.III. 1985), *aff'd*, 855 F.2d 385 (7th Cir. 1988). In *Deere*, one portion of a shipment, containing the "directors frame" of a computer, was damaged during transport to Germany. The court ruled that the weight of the entire shipment, which consisted of the various components of a single computer, was to be used in calculating the limitation of liability of the carrier under Article 22(2). *See id.*at 721. The court explained that damage done to the "directors frame" affected the value of the entire shipment, because the entire computer was rendered inoperable for several months until the damaged part could be replaced. *See id.*at 721.

The "affected-weight" rule as stated in *Deere* was restated in *Williams Dental Co., Inc. v. Air Express International*, 824 F. Supp. 435, 443 (S.D.N.Y. 1993), *B.R.I. Coverage Corp. v. Air Canada*, 725 F. Supp. 133, 139 (E.D.N.Y. 1989), *Hartford Fire Ins. v. Trans World Airlines, Inc.*, 671 F. Supp. 693, 694 (C.D.Ca. 1987), and *Arkwright Mutual Ins. Co. v. KLM Royal Dutch Airlines*, 1995 WL 491490 (S.D.N.Y. Aug. 17, 1995). "Recovery based upon a shipment's gross weight is permitted only when damage to a portion of a shipment affects the value

of the entire shipment." *Williams Dental*, 824 F. Supp. at 443, citing *B.R.I.*, 725 F. Supp. at 139. No decision has clearly gone the other way in terms of stating the general rule.

In its supplemental brief, Federal Express proposes that *Kalok Corp. v. Circle Freight Int'l*, 24 Avi. Cas. (CCH) 17,768 (N.D.Cal. 1993), can be seen as challenging the general rule above. In *Kalok*, the packaging of a shipment containing 1,728 disk drives arrived in a crushed condition. *Kalok* then tested all of the disk drives, and found that 78 of them had sustained damage. The plaintiffs advanced several theories for assessing liability under Article 22(2) on the basis of the total weight of the shipment. The court ultimately relied upon the total weight of the shipment. The court explained: "The damage sustained was faulty transportation sufficient to call into doubt the effectiveness of the disk drives, and hence to lower the drives value. Accordingly, the weight of each disk drive must be considered in determining the Warsaw Convention limit. . ." *See id.* at 17,771.

The court used the entire weight of the shipment because it decided that the entire shipment had *actually* sustained damage. The court, therefore, did not use the affected-weight standard, but rather the package-standard in assessing liability. In responding to plaintiff's affected-weight argument, the court stated that the plaintiff "mistat[ed] the significance of *Deere* because the affected weight standard was not actually upheld by the Seventh Circuit." Having clarified that "the Circuit expressed no opinion on the merit of whether the affected-weight standard is inapplicable under United States law," the court went on to find that the facts of the case before it were distinguishable from prior affected-weight cases. "Here, the physically damaged drives were

not necessary components to the workings of the physically intact drives." *Id.* at 17,771. Federal Express is therefore correct in noting that the court expressed reservations about the significance of *Deere* in the wake of the Seventh Circuit's affirmance. The court, however, did not hold that the affected-weight standard is a faulty standard to use in assessing liability. Furthermore, there is no disagreement that when an entire shipment has been damaged, the proper quantum of damages under the Warsaw Convention would be based upon the total weight of the shipment—in this context there is no reason to question the package-weight standard.

Given that multiple district courts in the United States have stated the general rule as the affected-weight standard, and given that the convention has nationwide, indeed, world-wide applicability, this Court will follow those precedents even if they are not strictly binding authority; otherwise, the law would be in conflict over a point that is ambiguous and arguable either way and the main need is to simply have a clear rule that commerce can rely on.

After oral argument, Federal Express submitted a supplement. It pointed out what no party had yet done—that the Seventh Circuit had reviewed the *Deere* decision. (Plaintiff had neglected to point out that the Seventh Circuit had arguably questioned the lower court's basis for holding.) According to Federal Express, the district court in *Deere* mistakenly assumed that the Warsaw Convention had already incorporated the later Hague Protocol. The Hague Protocol did indeed adopt an affected-weight standard, but was not effective in this country at the time in issue. Federal Express asserts that *Deere* "was decided incorrectly pursuant to the terms of the Hague Protocol, which is not in effect in the United States" citing to 855 F.2d at 388 and 621 F.Supp. at 722.

In fact, however, neither of those pages of the opinions state that *Deere* was based on the Hague Protocol. True, on appeal the airline argued that the district judge had gotten confused over the difference between the Hague Protocol and the subsequent Montreal Agreement but the Seventh Circuit refused to reach the argument because the airline had not raised the issue below. The Seventh Circuit affirmed that aspect of the appeal. Accordingly, this Court takes *Deere* at face value as a construction of the Warsaw Convention itself.

To bring this to a point, the Court is going to follow *Deere* and its affected-weight rule. If the damage sustained in part rendered the entire system inoperable, the proper weight to be considered under Article 22(2) of the Warsaw Convention is the total weight of the shipment.

In the future this problem will largely be solved by the Montreal Protocol No. 4, which adopts the affected-value standard of *Deere*. The judgment herein is thus consistent with the future law in this area, at least as far as concerns Warsaw Convention cases in which the countries involved have signed the Protocol.[2]

Having held that the Warsaw Convention employs an affected-value standard, it follows that Warsaw Convention liability cannot be reduced by contract. Article 23 is very clear in its prohibitions of any diminution of the level of compensation available under the convention below that set by the limitation-on-liability provision. Article 23 states:

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[2] The Montreal Protocol amends the Warsaw Convention, as amended by the Hague Protocol (1955). It interprets limits upon liability as based upon total weight. The Montreal Protocol is not applicable to the present case, as it was only effective as of 1999 and Japan is not a signatory. *See Montreal Protocol No. 4*, Signed at Montreal on September 25, 1975.

> [a]ny provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

Warsaw Convention, Art. 23.

Turning to the next issue, the parties argue about what is meant by "affects the whole shipment." In *Deere* the value of the shipment was affected by the loss of the use of the computer for a period of time.

This case is like *Deere*. Motorola claims that the entire shipment containing the Cellular Base Station system was rendered inoperable by the damage to the Common Control Frame (Koepke Decl. ¶ 6). During the six weeks that it took to get the replacements, Motorola could not begin to install the Cellular Base Station system (Koepke Decl. ¶ 7). Motorola suggests, therefore, that damage sustained to the part of the cargo affected the value of the whole.

There remain factual questions with regard to exactly what Motorola property was damaged and for how long. If it is shown at trial that the damaged parts caused the construction or operation of the shipped system to be delayed for a period of several weeks, then the weight that will be considered under Article 22(2) is the total weight of the shipment.

There Are Triable Issues of Material Fact

Summary judgment cannot be granted to plaintiffs because, viewing the evidence in a light most favorable to the non-moving parties, there is a genuine issue of material fact. Motorola claims that a Common Control Frame and the control cards that were located within the

frame were severely damaged (Sawada Decl. ¶4). The Sawada declaration is competent evidence as it is based upon personal knowledge. Kuehne & Nagel, however, offer the deposition testimony of Koepke as proof that Motorola's claim of damage is inaccurate (Tede Decl. Exh. "A"). The examiner refers Koepke to a shipping "manifest" that was either prepared by Motorola, by RSI (the packaging agency hired by Motorola), or by the manufacturer of the Cellular Base Station system. The "manifest" said that certain items had been excluded from the shipment. These items, however, were included among the cargo that Motorola had claimed was damaged during transport (Koepke Dep. 25: 1-25 and 26:1-5). Keopke is an agent of Motorola and was sent in response to Federal Express's deposition request for the "person most knowledgeable" within Motorola with regard to this shipment (K&N Opp. para. 1, at 6). The deposition is admissible as evidence under the Federal Rules of Evidence as an admission of a party-opponent. There is, therefore, an issue of fact regarding the meaning of this "manifest," who prepared it and what information it contains, *i.e.*, what exactly was damaged and how did it relate to the overall system. This issue is material to the outcome of this litigation, and is to be resolved at trial.

Notice

Federal Express argues both as an affirmative defense and as a basis on which to grant summary judgment in its favor that it did not receive proper notice of the damage to Motorola's property. Federal Express claims that it only became aware of this claim on March 31, 1998, when it received a claim letter from plaintiff's counsel (Opp. 11-12).

In brief, Kuehne & Nagel is shown at trial to have been the agent of Federal Express, then the requirement of notice under the convention is satisfied. Federal Express cannot hold Kuehne & Nagel out as its agent and then disclaim notice when notice was given to the agent. Furthermore, even if Kuehne & Nagel is not found to be Federal Express's agent, if Federal Express received the "Preliminary Notice of Claim," then the notice requirement is similarly satisfied. Finally, there are triable issues of fact regarding the adequacy of the damage notation on the delivery order (Kuehne & Nagel's house waybill). These fact issues will have to be resolved at trial.

If Kuehne & Nagel Was the Agent of Federal Express, Then Notice to Kuehne & Nagel Is Notice To Federal Express

Motorola claims that Kuehne & Nagel was the agent of Federal Express, Kuehne & Nagel does not dispute that it acted as Federal Express's agent in executing Federal Express's waybill. Kuehne & Nagel also does not dispute that it received timely notice of damage. Because of this, Motorola contends that notice to Kuehne & Nagel satisfies the notice requirement as to Federal Express.

In response, Federal Express maintains that this claim is both logically inconsistent and irrelevant. Federal Express suggests that Motorola is attempting to assign Kuehne & Nagel various and contradictory roles, because Motorola has suggested that Kuehne & Nagel acted as its agent for the purpose of standing, and acted as the agent of Federal Express for the purpose of satisfying the notice requirement.

The Court views this as counterfeit logic. If Kuehne & Nagel was installed by Federal Express as its agent, there is no inconsistency with Kuehne & Nagel being the party who was responsible for interacting with Motorola on one end and Federal Express on the other. In that case, the installation of Kuehne & Nagel as Federal Express's agent does not diminish Federal Express's responsibility to the shipper. If agency is shown, the receipt of notice by Kuehne & Nagel would be effective as to Federal Express irrespective of any other proofs of notice proffered by the plaintiffs.

It seems plausible to the Court that an agency relationship may have existed, given that Federal Express's master waybill lists Kuehne & Nagel as the "issuing carrier's agent." At a minimum, there is a triable issue of fact as to the nature of the relationship between Kuehne & Nagel and Federal Express. At trial, the Court will be interested to see any direct proof of Federal Express's designation of Kuehne & Nagel as an agent.

"Preliminary Notice of Claim"

Notice may be valid, moreover, even if Kuehne & Nagel was not the agent of Federal Express. Article 26 of the Warsaw Convention outlines the proper form that notice must take in order for the carrier to be held liable. "In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within . . . 7 days of receipt in the case of goods." Warsaw Convention Art. 26(2). All complaints must be in writing. Warsaw Convention Art. 26(3).

Federal Express makes two arguments with regard to notice. First, the "Preliminary Notice of Claim" which Kuehne & Nagel says was sent on July 18, 1997, was never sent, and even if it was sent, it was ineffective.

Second, the notation of damage on the front of Kuehne & Nagel's house waybill (delivery order) was ineffective. The court finds on the legal questions posed, that both the "Preliminary Notice of Claim" and the damage notation would be satisfactory forms of notice under the Warsaw Convention. The factual questions, with regard to the actual delivery of these documents and the adequacy of the translation of the damage notation, however, are questions to be resolved at trial.

Federal Express suggests that the "Preliminary Notice of Claim" which Motorola claims to have sent to Federal Express two days after the cargo was delivered is legally insufficient because no evidence has been presented setting forth who issued and received the notice, nor where and when the notice was given. (FX's Opp. 11). Federal Express says that document also failed to list the air waybill information (*id.* at 12).

The Court finds that the "Preliminary Notice of Claim" is satisfactory notice even though it is not detailed with precision. It is dated July 18, 1997, which is within the seven-day notice period required by the convention. It has the consignee's name on it, and was addressed to Federal Express. Finally, it said that there had been damage, delay or loss to the cargo, and reserved the right to file a claim when the details were ascertained (Ginger Decl., Exh. "D"). This notice, though brief, should have alerted Federal Express that there was a problem with the shipment of this property, and should have sparked an investigation.

Federal Express suggests that this was a blanket notice that Kuehne & Nagel gives out to all carriers it deals with, and as such, is tantamount to no notice at all. This suggestion is based upon a letter written by Nobo Ogawa to David McLeod, both of Kuehne & Nagel (Ginger Decl. Exh. "D"). In reviewing the letter, there are a

range of possible interpretations that can be given its language, especially when read in conjunction with the e-mail that the message above was responding to. Speculation as to the meaning of the e-mail does not create an issue in regard to the notice requirement. Even if sending out a preliminary claim was standard practice for Kuehne & Nagel (which it denies), this would not make the notice legally insufficient.

Although the summary judgment record seems to indicate that Federal Express received the "Preliminary Notice of Claim," Federal Express has affirmatively indicated that it did not receive notice and the items of proof of notification are indirect and inconclusive. For that reason a triable issue of fact exists.

Notation on Kuehne & Nagel's Waybill (Delivery Order)

Motorola claims that Federal Express was also made aware of the damage to its cargo through a notation made by Kuehne & Nagel on the front of its house air waybill (delivery order), upon receipt of the cargo from Federal Express (Reply Br. 3).

The notation of the front of the Kuehne & Nagel's house waybill is legally sufficient because Article 26(3) provides that notice to be made "upon the document of transportation or by separate notice in writing . . ." In this case, the notice was made upon a document of transportation. The document was produced by Federal Express in this action, and as such is admissible as a party admission.

There are however, several issues of fact regarding this notation. First, Motorola suggests that this notice was received by IACT, which it claims is a representative of Federal Express. The claim of agency between IACT and Federal Express is unsubstantiated. Second,

there is a question of fact regarding what the notation actually said. The notation has been translated from Japanese to English, but is has not been certified as an accurate translation, and it is unclear who provided the translation. There are, therefore, triable issues of fact as to the relationship between IACT and Federal Express and as to the adequacy of the translation of the damage notation.

Standing

As explained above, Motorola claims that Kuehne & Nagel was the agent of Federal Express. The Court holds that if Kuehne & Nagel acted as Federal Express's agent, then Motorola has standing to bring this action against both defendants.

Under the Warsaw Convention, the "consignor" and the "consignee" have a right of action . . . against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place." Warsaw Convention Art. 30(3). Federal Express's air waybill lists Kuehne & Nagel as the consignee, and Kuehne & Nagel, Japan, Ltd. as the consignor of this cargo. Federal Express argues that Article 30(3) dictates that only the consignee or the consignor listed on the air waybill may bring an action of this type (Opp. 14-15). In its view, the plaintiffs lack standing because they were not listed in either position.

Notwithstanding its absence on Federal Express's air waybill, Motorola may have standing to maintain this action against Federal Express. This is because it may be shown at trial that Federal Express installed Kuehne & Nagel as its agent. If the defendants had an agency relationship, then Motorola's contract with Kuehne & Nagel was effectively an agreement with Federal Express and Federal Express will not be able to immunize itself from

suit through the placement of Kuehne & Nagel in the position of "consignor."

Lastly, if Motorola is found to have standing, then standing will also be conferred upon Fireman's Fund, as its successor-in-interest, through its subrogation agreement with Motorola (FX Opp., Exh. "D" at 11). See *B.R.I. Coverage Corp. v. Air Canada*, 725 F. Supp. 133, 136 (E.D.N.Y. 1989).

At Least Some Damage to Plaintiff's Property Was Sustained During Air Transportation and While the Cargo Was Under the Care, Custody and Control of Federal Express

Kuehne & Nagel made a motion for partial summary judgment stating that the damage that did occur in this case happened during air transportation as defined by the Warsaw Convention, while the cargo was under the care, custody and control of Federal Express. It is undisputed that cargo was being transported under a contract for air transport. The "clean" air waybills are evidence of the apparent good condition of the cargo until after the transportation of the cargo began. Though Motorola and Kuehne & Nagel claim that damage was noted upon receipt of property by Kuehne & Nagel at the airport in Japan, as explained above, there are questions of fact regarding the reliability of this evidence. Damage was confirmed upon receipt of the cargo by Motorola (Sawada Decl. ¶ 4). Since no parties timely opposed this motion, the Court holds that the damage in this case was sustained during the course of air transportation as defined by the Warsaw Convention, and while the cargo was under the care, custody and control of Federal Express. As explained above, the factual issue of the scope of damage still requires resolution.

CONCLUSION

The Warsaw Convention applies to this case. Under the Article 22(2) of the convention, if the value of the entire shipment was affected by the damage that was done to a portion of the equipment, then the limit on liability is based upon the total weight of Motorola's cargo.

Neither plaintiffs nor defendant Federal Express is entitled to summary judgment as there are triable issues of material fact which must still be resolved with regard to whether the overall shipment was so affected, the scope of the damage done to Motorola's property, the receipt of notice, and as to the existence of an agency relationship between Federal Express and Kuehne & Nagel.

Though there remains a factual issue as to exactly what Motorola property was damaged, it is clear that at least some damage was sustained to the Cellular Base Station system, and this damage occurred "during air transportation" as defined by the Convention, and while the property was under the care, custody and control of Federal Express. For this reason, Kuehne & Nagel's motion for partial summary judgment is granted. Lastly, Kuehne & Nagel cross claim for equitable and comparative indemnity and contribution from Federal Express is postponed until the completion of trial.

IT IS SO ORDERED.

Dated: September 25, 2000

/S/ WILLIAM ALSUP
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. C99-03659 WHA
Filed October 11, 2000

MOTOROLA, INC., a corporation, and FIREMAN'S FUND INSURANCE COMPANY, a corporation,

Plaintiffs,

—VS.—

FEDERAL EXPRESS, a corporation; KUEHNE & NAGEL, INC., a corporation, and DOES ONE through TEN, inclusive,

Defendants.

Trial Date: October 18, 2000
Time: 2:00 p.m.
Place: Courtroom 9, 19th Floor
Judge: Hon. William Alsup

JOINT (PROPOSED) FINAL PRETRIAL ORDER

Pursuant to the Court's order at the pre-trial conference held on September 26, 2000, the parties hereby submit the following revised joint final pretrial order to conform with the Court's September 25, 2000 Order Granting in part and Denying in part the parties' motions and cross-motions for summary judgment/adjudication (hereinafter "Order").

A. *Brief Description of the Claims & Defenses To Be Tried*

This case involves damage to Motorola's Cellular Base Station system during transportation as more fully set forth in the Court's Statement at page 2:15 of its Order. The issues remaining for resolution in this case are:

1. Exactly what parts of the shipment were damaged.
2. Whether the damage affected the value of the entire system.
3. Whether Federal Express ("Fed Ex") received timely notice of claim pursuant to Article 26.
4. The nature of the relationship between Kuehne & Nagel ("K&N") and Fed Ex with respect to

the shipment, Motorola's standing to sue Fed Ex and notice of damage.

5. The meaning of the Japanese hand-written notation on the front of K & N's house waybill (delivery order).

6. Whether K&N sent the "Preliminary Notice of Claim" to Fed Ex on July 18, 1997.

7. Whether plaintiffs possess standing to pursue their action against Fed Ex pursuant to Article 30.

8. The amount of damages sustained by plaintiffs.

9. Whether either defendant can limit its liability to plaintiffs and, if so, to what amount.

10. Whether the shipment was properly packaged.

11. Whether Fed Ex is liable to K&N for indemnity for any damages awarded to plaintiffs and for attorney fees and costs incurred by K&N in defense of this action.

B. *STATEMENT OF ALL RELIEF SOUGHT*

Plaintiffs seek damages against both defendants, excluding costs and interest, of $462,065.60. If the Court finds defendants can avail themselves of Article 22's limitation provision, plaintiffs then seek damages in the amount of $244,040.00.

Defendant Fed Ex seeks a determination that it has no liability to either plaintiff or K&N based on Article 26's notice requirement. Fed Ex also seeks a determination that plaintiffs do not possess standing. Both defendants seek a determination that they are not liable for the damages, however, if found liable, both defendants then seek

a determination that their liability is limited to $13,680. Defendant K&N also seeks a determination that Fed Ex owes K&N equitable indemnity for any damages awarded to plaintiffs and for attorney fees and costs incurred by K&N in defense of this action.

C. *STIPULATED FACTS*

The parties hereby stipulate and agree to the following facts:

1. Motorola, Inc. is now and at all times material herein was a corporation duly organized and existing according to law.

2. Fireman's Fund Insurance Company is now and at all times material herein was a corporation duly organized and existing according to law and the insurer of the Cellular Base Station System (hereinafter "the shipment").

3. Motorola hired defendant Kuehne and Nagel ("K&N") to transport the shipment via air from Dallas, Texas to Tokyo, Japan.

4. K&N arranged for Fed Ex to transport the shipment by air from Dallas, Texas to Tokyo, Japan.

5. Motorola hired RSI to package the shipment.

6. RSI packaged the shipment and arranged for the shipment to be transported to Fed Ex.

7. Fed Ex received the shipment on July 8, 1997 at the airport in Dallas, Texas.

8. Fed Ex issued air waybill no. 023 9052 3926 and K&N issued air waybill no. 67701336 for the shipment on July 8, 1997.

9. K&N executed Fed Ex's waybill on behalf of Fed Ex.

10. When Fed Ex and K&N issued the air waybills on July 8, 1997 in Dallas, Texas, the air waybills were issued "clean", i.e. there was no notation of any damage to the shipment.

11. Fed Ex transported the shipment by air from Dallas, Texas to Tokyo, Japan.

12. On July 16, 1997, K&N Japan accepted delivery of the shipment at the airport in Tokyo from Fed Ex.

13. K&N delivered the shipment to Nippon Motorola Ltd.

14. On August 15, 1997, K. Inoue, on behalf of Nippon Motorola, conducted a survey of the shipment in Japan.

15. The Cellular Base Station System cannot operate without the common control frame and the cards within it.

16. Motorola submitted a claim to plaintiff Fireman's Fund Insurance Company in the amount of $459,330.70 for the alleged damage to the shipment (the "claim").

17. Fireman's Fund paid Motorola $434,330.70 for the claim.

18. Fireman's Fund paid the surveyor $2,734.90 for his fees related to the claim.

19. The shipment weighed 12,204 kilograms and the individual components which plaintiffs alleged were damaged weighed 680 kilograms.

D. *FACTUAL ISSUES RESOLVED BY SUMMARY ADJUDICATION ORDER*

1. Damage to the shipment occurred during the course of air transportation while under the care, custody and control of Fed Ex (Order 13:27-14:3).

2. K & N received timely notice of damage from Motorola (Order 9:26-27).

E. *LEGAL ISSUES RESOLVED BY SUMMARY ADJUDICATION ORDER*

1. The movement of the system was "transport of goods" as defined by the Warsaw Convention Art. 1(2). Both Federal Express and Kuehne & Nagel are subject to carrier liability under the convention (Order 3:19-22).

2. If it is shown at trial that the damage to the shipment rendered the entire system inoperable and caused the construction or operation of the shipped system to be delayed for a period of several weeks, then the proper weight to be considered under Article 22(2) of the Warsaw Convention is the total weight of the shipment (Order 7:12-14; 8:13-16).

F. *FACTUAL ISSUES TO BE TRIED*

1. Whether K&N made note of damage on the delivery order.

2. Whether K&N sent preliminary notice of claim to Fed Ex within 7 days of receipt of the shipment on July 16, 1997.

3. Exactly what parts of the shipment were damaged when received by Motorola and whether the claimed damage affected the value of the entire shipment by rendering the entire system inoperable and causing the construction or operation of the system to be delayed for a period of several weeks.

4. Whether Motorola replaced the damage components.

5. Whether the replacement costs for the damaged components, including freight and insurance, was $459,330.70.

6. Whether plaintiffs incurred damages of $462,065.60 resulting from the damage to the system's common control frame and the cards within it.

7. Whether the shipment was properly packaged.

8. Who owned the shipment that is the subject of this action.

9. The amount of attorneys' fees and costs incurred by K&N in defense against the claims asserted by the plaintiffs (which, pursuant to L.R. 54-5 is raised by post-judgment motion, if pertinent).

10. *Contentions*: K&N contends that exactly what was shipped by Motorola is a factual issue to be tried. Plaintiffs contend that proof of exactly what parts were damaged-renders proof of what was shipped unnecessary.

G. *LEGAL ISSUES TO BE TRIED*

1. Whether Fed Ex is liable to K&N and, if so, the extent of that liability.

2. Whether Fed Ex has waived the "real party in interest" defense to Motorola's claim.

3. *Contentions:* K&N contends that a legal issue to be tried is whether Fed Ex is liable to plaintiffs, and if so, the extent of that liability. Plaintiffs contend that the Court's ruling on motions for summary adjudication resolved the issue of K&N's legal liability to plaintiffs for damage to the shipment subject only to resolution at trial of the factual issue set forth in factual issue # 3 above.

H. *JOINT EXHIBIT LIST*

The parties will file separately a joint exhibit list as follows:

1. Exhibits which the parties have stipulated are admissible are listed in the attached Joint Exhibit list as Exhibits 1—.

2. Plaintiffs' exhibits are listed beginning at Exhibit # 50.

3. K&N's exhibits are listed beginning at Exhibit # 100.

4. Fed Ex's exhibits are listed beginning at Exhibit # 200.

I. *WITNESS STATEMENTS*

The parties' witness statements have been previously filed separately from this document. However, the parties incorporate said witness lists by reference into this proposed order.

I. *PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW*

The parties previously filed proposed findings of fact and conclusions of law prior to the Court's rulings on the motions for summary adjudication and will file amended versions no later than October 18, 2000.

K. *TRIAL BRIEFS*

The parties previously filed trial briefs in this matter.

Dated: October 11, 2000 GIBSON & ROBB

By STANLEY L. GIBSON
Stanley L. Gibson
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Dated: October 11, 2000 FLYNN, DELICH & WISE

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Kuehne & Nagel, Inc.

Dated: October 11, 2000 FEDERAL EXPRESS CORPORATION

By J. RUSSELL PHILLIPS
J. Russell Phillips
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FEDERAL EXPRESS CORPORATION

IT IS ORDERED.

Dated: October __, 2000

Hon. William H. Aslup